

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

SHERMAN KYLE III,)	CASE NO. 5:11CV1395
)	
Petitioner,)	JUDGE GAUGHAN
)	MAGISTRATE JUDGE BURKE
v.)	
)	
RICHARD GANSHEIMER, Warden)	
)	
)	
)	Report and Recommendation
)	(Docs. 12 and 13)
Respondent.)	

On October 24, 2011, Respondent filed a Motion to Dismiss. Doc. 12. In response, Petitioner filed a Motion for Stay and Abeyance. Doc. 13. Respondent filed an Opposition to the Motion for Stay (Doc. 14) and Petitioner then filed a Response to Respondent's Opposition (Doc. 16). The basis for Respondent's Motion to Dismiss and Petitioner's Motion for Stay and Abeyance was a pending appeal filed by Petitioner in state court concerning allegedly defective jury forms and jury instructions. *State v. Kyle*, Summit County C.A. No. 25974. Doc. 12, p. 12. Pursuant to the undersigned's May 15, 2012, Order (Doc. 29), Respondent advised this Court on May 24, 2012, that said appeal has now been exhausted, thus resulting in a withdraw by Respondent of its Motion to Dismiss. Doc. 30, p. 3.

Since Respondent has withdrawn its Motion to Dismiss (Doc. 12), it is hereby recommended that Respondent's Motion to Dismiss (Doc. 12) be DENIED as moot. Further, Petitioner's Motion for Stay and Abeyance (Doc. 13) was also based on the premise that there was a pending state court proceeding and was filed in Response to Respondent's Motion to

Dismiss. Accordingly, it is hereby recommended that Petitioner's Motion for Stay and Abeyance (Doc. 13) likewise be DENIED as moot.

Petitioner's habeas petition (Doc. 1) and the briefing relating thereto remain pending for consideration and will be addressed by separate report and recommendation. Nothing contained herein constitutes a report and recommendation on the merits of Petitioner's Petition for Habeas Corpus (Doc. 1) or precludes a finding of a procedural default once the Court proceeds with consideration of the entire habeas petition.

Dated: May 31, 2012



Kathleen B. Burke
United States Magistrate Judge

Any objections to this Report and Recommendation must be filed with the Clerk of Courts within fourteen (14) days after the party objecting has been served with a copy of this Report and Recommendation. Failure to file objections within the specified time may waive the right to appeal the District Court's order. See *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). See also *Thomas v. Arn*, 474 U.S. 140 (1985), *reh'g denied*, 474 U.S. 1111 (1986).